

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
And Nora Mead Brownell.

Consolidated Edison Company of New York, Inc. Docket Nos. ER01-1385-001 and
EL01-45-001

ORDER ON MOTIONS REQUESTING EXTENSION OF
THE REVISED LOCALIZED MITIGATION MEASURES

(Issued November 27, 2001)

On October 5, 2001, Consolidated Edison Company of New York, Inc. (ConEd) filed a motion with the Commission to extend the Revised Localized Market-Power Mitigation Measures (Revised LMM) until October 31, 2002. The Commission's July 20, 2001 order in this proceeding approved the Revised LMM and required those measures to expire on October 31, 2001. In this order, we deny ConEd's proposed extension of the Revised LMM because it is procedurally improper. However, we direct the New York Independent System Operator, Inc. (NYISO), as part of the comprehensive mitigation proposal required by our order on NYISO's automated mitigation procedure (AMP),¹ to address the Commission's concerns identified in this order concerning the Revised LMM. We find that the Commission's action is in the public interest because it ensures that the Commission's filing requirements are followed and establishes procedures to improve NYISO's Market Power Mitigation Measures.

¹Order acting on September 28, 2001 filing by NYISO in Docket No. ER01-3155-001 to extend the AMP until October 31, 2002, which would otherwise expire on October 31, 2001. 97 FERC ¶ 61,____ (2001).

I. Background

In an order issued in this proceeding on October 15, 2001,² the Commission denied rehearing of its July 20, 2001 order.³ In the July 20 Order, the Commission granted rehearing of its May 16, 2001 order⁴ and found the Revised LMM to be reasonable for an interim period ending October 31, 2001. In the May 16 Order, the Commission had rejected without prejudice the Revised LMM proposed by ConEd.⁵

In the October 15 Order, the Commission reaffirmed that its approval of ConEd's proposal for the duration of the 2001 Summer Capability Period was reasonable because the conditions that gave rise to potential market power in the City may still exist, supplies in the New York City were projected to be tight during that period, and the effectiveness of new demand response programs was then uncertain. The October 15 Order stated that since the Summer Capability Period was near its end, and the expanded in-city mitigation was about to expire, there was little to be gained at that time by a comprehensive review of whether, and under what circumstances, market power may exist in the New York City market and, if so, what additional mitigation may be appropriate. Therefore the Commission allowed the revised market power mitigation measures to be left in place during the 2001 summer capability period. The Commission viewed the proposed revised market power mitigation measures as only a temporary measure.

Additionally, in the October 15 Order, the Commission reiterated its intention to review these issues if a filing is made to reinstate some form of additional mitigation. The Commission stated that if parties propose to reinstate some form of additional mitigation, they need to address the generators' concerns in their filings. In particular, the parties would need to explain how the proposed mitigation will work in conjunction with other mitigation measures already in effect or proposed for NYISO. The parties will also need to explain whether the mitigation is designed to apply only in must-run situations or more broadly. If more broadly, they should justify why that is appropriate.

²97 FERC ¶ 61,050 (2001).

³96 FERC ¶ 61,095 (2001).

⁴95 FERC ¶ 61,216 (2001).

⁵See the May 16 and July 20 Orders for a discussion of the procedural background of the Revised LMM.

II. This Filing

On October 5, 2001, ConEd filed a motion with the Commission to extend the Revised LMM until October 31, 2002, which would otherwise expire on October 31, 2001.⁶ ConEd states that the primary reason to allow an extension of the Revised LMM is to protect New York City consumers from the same conditions of vulnerability to transitional market power in the summer of 2002 that the Commission sought to safeguard against in its July 20 Order. Secondly, it states that an extension will permit an adequate period for the evaluation of the measures in actual operation, as it believes the Commission intended in its July 20 Order. It states that the extension would permit the Revised LMM to go into effect with respect to the real-time market, which it believes is the most critical gap remaining in the protection of consumers from localized market power in New York City.

ConEd explains that in the July 20 Order, the Commission envisioned that, based on actual working experience with the Revised LLM, NYISO would propose "whatever additional measures may be required" after October 31, 2001. Thus, the Commission directed NYISO, working with market participants, to evaluate and propose an extension or modification of the Revised LMM for periods after October 31, 2001, if appropriate. ConEd states that unfortunately the scenario that was envisioned by the Commission has not occurred. It states that NYISO could not develop the software needed to implement the Revised LMM in the real-time market for at least twelve to sixteen weeks and was also unable to begin applying other portions of the Revised LMM until August 27, 2001. It states that NYISO has not had the resources nor the data necessary to evaluate the effectiveness of the Revised LMM. Thus, there is no body of experience on which to base an informed evaluation of the Revised LMM.

ConEd states that the conditions requiring the Revised LMM are almost certain to be present this coming summer, as they were this past summer. Moreover, since market power problems may arise in shoulder periods as well, it is preferable to keep the Revised LMM in place while evaluating them and working with market participants, rather than terminating the Revised LMM.

ConEd states that the Commission should direct NYISO to undertake software development, testing and evaluation so that the NYISO can implement the Revised LMM in the real-time market in time for next summer. Also, ConEd believes that the Commission, as it did in the July 20 Order, should direct NYISO, after next summer, to coordinate all mitigation measures and determine what measures NYISO needs beyond

⁶No tariff sheets were submitted as part of the filing.

October 31, 2002. In this way, ConEd believes, Stakeholders, the NYISO, and the Commission will have an adequate opportunity to review the impact of the Revised LMM and be able to reach informed conclusions about the interplay of the Revised LMM with the NYISO mitigation measures.

III. Comments

Comments on ConEd's filing were filed by entities listed in the Appendix to this order. Section 385.213(a)(2) of the Commission's regulations prohibits an answer to comments unless otherwise ordered by the decisional authority. Accordingly, the answers filed by Keyspan-Ravenswood, Inc. (KeySpan), ConEd and the New York State Public Service Commission (New York Commission) are rejected.

Four parties filed comments supporting ConEd's proposal. The City of New York and all others supporting ConEd believe that the extension of the Revised LMM is necessary while New York City is in the transition to a competitive market. They maintain that the New York City wholesale electricity market continues to be especially vulnerable to the exercise of market power since it is a significant "load pocket", there are currently only a limited number of owners of merchant generation, and the current in-City supply is tight. Additionally, the City of New York contends that a traditional cost-based auction system is necessary to keep prices moderate until New York wholesale markets are determined to be workably competitive, which includes the ability of all customers to reduce real-time consumption in response to high prices.

The New York Commission urges the Commission to direct the NYISO to implement all aspects of the Revised LMM in the real-time market as soon as possible and certainly no later than May 1, 2002.⁷ They state that their strategy has been to use mitigation measures to protect customers in the short term, while pursuing long-term policy that will facilitate new entry of generation into the market so that sufficient competition will eventually develop. The New York Commission requests that the Commission convene a technical conference to explore the conditions under which the Revised LMM could be removed. However, at this time, the New York Commission believes that allowing the Revised LMM to expire would mean that NYISO's generic measures with their high thresholds (300 percent for bidding conduct and 200 percent for price impact) and their frequent implementation delay would amount to giving generators

⁷They would prefer that the Revised LMM be implemented in the real-time market immediately, however, it believes May 1, 2002, is a crucial implementation date because transmission constraints that contribute to a lack of market competitiveness are more likely in hot weather. New York Commission Comments at footnote 2.

the opportunity to adjust bidding behavior to raise prices in the real-time market dramatically above competitive levels. Thus, the New York Commission states that the Revised LMM, which are activated only when transmission constraints create a need for them, are well-designed and mitigate only to the extent necessary. The New York Commission contends that the Revised LMM are similar to the mitigation rules the Commission approved for transmission constrained load pockets in PJM⁸ and generally in the context of a future RTO.⁹

The New York State Consumer Protection Board (Consumer Board) agrees with many of comments described above. Consumer Board adds that supplies were indeed tight in the summer of 2001. It states that during the week of August 6, 2001, when New York experienced three consecutive days of all-time peak demand, the NYISO had to take a number of emergency actions to maintain system reliability and meet customer load. It claims that electricity supply conditions are not expected to be significantly higher during the upcoming summer, as no major generating capacity is expected in the New York Control Area before that time. It appears that supply will remain tight, as was the case this past summer. Therefore, it urges the Commission to continue the Revised LMM.

NYISO suggests that the Revised LMM be kept in place while it consults with its stakeholders concerning in-City mitigation revisions in the context of the other mitigation measures it administers. In response to the issues raised by the LMM, NYISO states that it has initiated a process for review and evaluation by the NYISO and its stakeholders of any proposed revisions to the in-City mitigation measures. NYISO states that it will coordinate with ConEd any additional filings with the Commission that may be necessary. NYISO intends to have an appropriate set of revised in-City mitigation measures in time for the Summer 2002 Capability period. In the meantime, it believes that the current Revised LMM should remain in place.

Six parties objected to ConEd's proposal. Independent Power Producers of New York, Inc. (IPPNY); NRG Power Marketing, Inc, Arthur Kill Power LLC, and Astoria Gas Turbine Power LLC (collectively, NRG Companies); and Mirant Americas Energy Marketing, LP, Mirant New York, Inc., Mirant Bowline, LLC, Mirant Lovett, LLC, and Mirant NY-GEN, LLC (collectively, Mirant Companies) oppose ConEd's motion to extend the Revised LMM on the grounds that ConEd seeks to modify a rate schedule by a motion under Rule 212 of the Commission's Rules and Practice and Procedure and

⁸PJM Interconnection, L.L.C., 96 FERC ¶ 61,233 (2001).

⁹PJM Interconnection, L.L.C., et al., 96 FERC ¶ 61,061 (2001).

therefore violates the requirements that tariff modifications be filed under section 205 or 206 of the Federal Power Act.

IPPNY, NRG Companies, and Mirant Companies state that ConEd's motion is clearly not a section 206 complaint (or a section 205 filing¹⁰) and therefore should be rejected. Additionally, they state that section 206 requires the complainant to bear the burden of showing that the proposed changes to a rate schedule are required by the public interest. As further discussed below, they believe ConEd has not borne this burden. They state that the Commission has consistently rejected efforts to present section 206 complaints through other types of pleadings (e.g., motions) because such a submission does not allow the interested parties sufficient notice since it is not formally docketed or noticed.¹¹ They also contend that ConEd's failure to abide by the requirements of section 206 affects the effective date of ConEd's proposed request. Under a section 206 filing, the effective date cannot be earlier than 60 days following the filing of the complaint. They urge the Commission not to let parties avoid their obligations under sections 205 and 206 by using motions.

All parties protesting¹² ConEd's proposal assert that ConEd offers no evidence to support its request to extend the Revised LMM. They state that the Commission left it to the NYISO, not ConEd, to develop any necessary market mitigation measures extending after October 31, 2001. They state that the NYISO has put ample protections in place against any potential market power abuse (e.g., MMM, including the AMP). They also contend that ConEd's actions are prohibited by the Commission's directives in its May 16 and July 20 Orders, regarding coordination with the NYISO and use of the effective stakeholder process. ConEd should not be permitted to circumvent the Commission's directives. These parties request that the Commission deny ConEd's request to extend the Revised LMM and direct ConEd to use the NYISO stakeholder process to address any market mitigation concerns that remain given the NYISO's many market mitigation protections.

¹⁰IPPNY, NRG Companies and Mirant Companies believe that the only entity that could propose such a revision under Section 205 as applied to in-City generation facilities is NYISO.

¹¹Louisiana Power and Light Company, 50 FERC ¶ 61,040 (1990). Mirant Companies' Protest at 11.

¹²See entities listed in the Appendix to this order with "*".

NRG Companies and Mirant Companies state that the Commission required that any proposal to extend the additional mitigation must address four areas listed by the Commission. They contend that any proposal must: (1) address the generators' concerns; (2) explain how the proposed mitigation will work in conjunction with other mitigation measures already in effect or proposed for NYISO; (3) explain whether the mitigation is designed to apply only in must-run situations or more broadly; and (4) if more broadly, justify why that is appropriate. They believe that ConEd's motion does not satisfy any of these directives. NRG also mentions that the software needed to implement the real-time market mitigation could not be completed by the November 1, 2001 requested extension date. NYISO has made it clear that it will not be working on necessary changes because of other priorities. Thus, the expanded measures may not be able to be implemented, since no work is being done on the software at this time. Additionally, NRG Companies continue to reiterate arguments made in their earlier protests that the Revised LMM and the MMM are duplicative, that the Revised LMM will result in unjust and unreasonable below-cost rates for New York City generators (due to reference price inadequacies), that ConEd has underscheduled its load, and that implementation of ConEd's proposal would give ConEd a cost-free hedge and reduce the incentive to construct new generation.

Electric Power Supply Association (EPSA), IPPNY, NRG Companies, and Mirant Companies state that neither the NYISO nor ConEd have shown that market abuse exists, or that the current market mitigation measures are unjust and unreasonable. They assert that neither the NYISO or ConEd makes any credible case that the market has experienced undue abuse. IPPNY contends that ConEd makes no demonstration that supplies are projected to be tight during the fall and winter 2001-2002. Absent this showing, there is no basis to extend beyond October 31, 2001. EPSA reminds the Commission of its comments of August 20, 2001, in which EPSA highlighted how the New York Market Advisor's Report illustrates that the existing mitigation measures are adequate and effective. EPSA states that at a time when new generation is needed, the proposed actions would create uncertainty that will discourage and delay much-needed investment. EPSA believes that extension of the Revised LMM will have profound and serious consequences for energy prices and the long-term competitive viability of the markets that, in the long-run, would harm customers.

Mirant Companies suggest that the Revised LMM will impair competitiveness of the market by inhibiting the development of in-City generation and muting the price-responsiveness of load. They state that it is important to permit the appropriate price signals to be sent inside the City to encourage market participants to build new generation, as well as to make other efficient supply-side and demand-side decisions. They request the Commission to instruct ConEd that if it wishes to implement the Revised LMM for the 2002 summer period, it must make a section 206 filing in the late

winter or early spring and demonstrate the need for the Revised LMM for the summer of 2002.

Keyspan suggests that if the Commission determines an extension is required, such an extension be only for six months, to expire no later than April 30, 2002. Further, it believes that such an extension should only be granted on the condition that:

(1) reference prices for in-City generators mitigated in the day-ahead market be revised immediately to be the same as those used by the NYISO's AMP in the day-ahead market, with reference prices for real-time in-City mitigation reflecting AMP prices revised to reflect the cost of operating in the real-time market; (2) a comprehensive study of the various mitigation measures is completed and a coordinated mitigation plan is implemented prior to Summer 2002, with a filing by February 1, 2002;¹³ (3) the ConEd rate schedule be canceled and the NYISO have sole responsibility for developing, implementing and administering tariff provisions for mitigation of New York suppliers.

One entity, the Power Authority of the State of New York (Power Authority) opposes ConEd's motion, in part. It does not oppose the extension of the Revised LMM pertaining to real-time markets to all units in the City, as well as new generation. However, it believes that any extension in the real-time market must be accompanied by more appropriate reference prices. The Power Authority states that its retail customers have been assessed over \$70 million in charges (uplift payments) associated with the prices charged by units in real-time market needed to meet local reliability requirements. However, it does not believe that the Revised LMM should apply to the day-ahead market for units not divested by ConEd or new generating facilities. The Power Authority agrees with other commentors that sufficient mitigation measures are already imposed by NYISO in the day-ahead market, and that ConEd's filing does not support the extension of the Revised LMM in the day-ahead market, as was required by the Commission. It continues to state that the Revised LMM in the day-ahead market will deter investment in new capacity in New York City.

IV. Discussion

The Commission denies ConEd's October 5 motion because it is improper to request a revision of tariff sheets, including the expiration date of tariff provisions, through a motion. Rather, the appropriate section 205 or 206 filing is required. ConEd has not provided justification for this deviation from our procedures, and the Commission

¹³It suggests that if the NYISO does not make such a filing in a timely manner, the Commission should determine what mitigation should be in place for the Summer 2002. KeySpan protest at 2.

is reluctant to encourage such improper filings by stretching our rules to accommodate ConEd's filing. The Commission has consistently rejected efforts to treat various filings as section 206 complaints.¹⁴ The Commission's denial of ConEd's motion is without prejudice to an appropriate section 205 (by NYISO) or 206 filing.

We also note that neither ConEd nor NYISO has addressed the concerns expressed by the Commission in the July 20 Order that NYISO have in place a coordinated set of mitigation measures, and that this issue be addressed promptly through the stakeholder process. However, in its comments on ConEd's motion, NYISO outlined a process that may be used to address the Commission's concerns. We encourage this process, including NYISO's efforts to: 1) develop a "strawman" proposal for consideration by the appropriate stakeholder committees that would integrate in-City mitigation with the other mitigation measures administered by NYISO (the MMM, including the AMP); 2) evaluate, before the stakeholder review process, the appropriate means of in-City mitigation in real time; and, 3) evaluate, through the stakeholder review process, the extent to which market conditions in New York City may warrant structural triggers for market power mitigation; whether in-City mitigation measures should apply only to reliability must-run units, or more broadly, and whether reliability must-run units are adequately addressed by any in-City mitigation measures; and whether in-City mitigation measures should apply to all generation in New York City, or just to units divested by ConEd. As indicated in the Commission's order on NYISO's AMP proposal in Docket No. ER01-3155, the Commission expects that this process will result in the appropriate filing with this Commission on or before March 1, 2002, so that revised mitigation provisions may be in place for the 2002 Summer Capability Period beginning May 1, 2002.¹⁵

The filing that NYISO must make for the summer of 2002 must address the experience with in-City mitigation during the 2001 Summer Capability Period, however limited that experience may be, and consider mitigation measures used by PJM and ISO-NE to aid in the transition to a Northeast RTO. In addition, the filing needs to address the reasonableness of any reference prices proposed to be used, and how the proposed use of such prices is consistent with NYISO's comprehensive market mitigation plan. Further, NYISO and ConEd must file revised tariff sheets that place all in-City mitigation measures in NYISO's tariff and remove them from ConEd's tariff. That filing must also

¹⁴See *Louisiana Power and Light Company*, 50 FERC ¶ 61,040 (1990).

¹⁵Since the Commission in this order is denying ConEd's October 5 motion, the Commission will here deny as moot ConEd's October 26, 2001 motion for expedited consideration.

address, and remedy to the extent required in NYISO's tariff and in the operations of NYISO and ConEd, allegations such as those made by Orion¹⁶ that ConEd currently has operational responsibility for the New York City transmission grid and can direct out-of-merit dispatch. Ultimate responsibility for such functions, if not hands-on operational control, must lie with NYISO rather than ConEd.

The Commission orders:

(A) ConEd's October 5, 2001 and October 26, 2001 motions in this proceeding are denied without prejudice to the appropriate filing, as discussed in the body of this order.

(B) The filing that NYISO is required to make by the Commission's order on NYISO's AMP filing in Docket No. ER01-3155 shall also address the Commission's concerns with NYISO's in-City mitigation measures, as discussed in the body of this order.

By the Commission.

(S E A L)

David P. Boergers,
Secretary.

¹⁶See page 3 of Orion's July 26, 2001 request for rehearing in this proceeding.

Appendix

Consolidated Edison Company of New York, Inc.
Docket Nos. ER01-1385-001 and EL01-45-001
Comments

City of New York
Electric Power Supply Association*
Independent Power Producers of New York, Inc.*
KeySpan-Ravenswood, Inc.*
Mirant Americas Energy Marketing, LP, Mirant New York, Inc., Mirant Bowline, LLC,
Mirant Lovett, LLC, and Mirant NY-GEN, LLC (Mirant Companies)*
New York Independent System Operator, Inc.
New York State Consumer Protection Board
New York State Public Service Commission
NRG Power Marketing, Inc, Arthur Kill Power LLC, and Astoria Gas Turbine Power
LLC (NRG Companies)*
Orion Power New York GP, Inc.*
Power Authority of the State of New York*

* comments objecting to ConEd's motion